No. 82-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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September 1983

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ARGUMENT IN REPLY

In the Brief for Respondents in Opposition ("Opp. Br."), the government argues, primarily through footnotes, that the decision of the court of appeals in this case was both insignificant and correct. That argument misapprehends, in large part, the factual and legal basis of the Petition.

Initially, the government argues in footnote 4 of its brief that this case is of little significance. In their Petition, the applicants noted that in a separate class action, *Akootchook v. Watt,* No. F-82-4 (D. Alaska, filed Jan. 15, 1982) (appeal filed Sept. 12, 1983), the government argued that *Shields* precluded the granting of allotments to over 150 applicants. In response the government here stated that since no decision had been issued in *Akootchook,* the effect of *Shields* was "speculative." Opp. Br. at 4 n.4. While true at the time its brief was filed, the question is no longer speculative. On August 5, 1983, the district court ruled against the plaintiffs in *Akootchook,* basing its decision squarely on *Shields.* See *Akootchook v. Watt,* No. F-82-4, Mem. Opinion at 8 (D. Alaska, August 5, 1983). The court expressly stated:

> Plaintiffs now make the same argument to this court that they made at the administrative proceedings, *i.e.,* that they met the use requirement in section three of the Alaska Native Allotment Act by tacking the rights of prior entrymen. The court disagrees with plaintiffs. A recent Ninth Circuit case makes it clear that allotments under the Act must be based on personal occupancy and may not be acquired through tacking ancestral occupancy rights. *See Shields v. United States,* 698 F.2d 987, 989 (9th Cir. 1983). Accordingly, it is proper to grant summary judgment to defendants to the effect that the lands at issue are not available for allotment by applicants whose individual use and occupancy began after Pickett Act withdrawals.

Id.

Respondents further contended that even if *Shields* governs *Akootchook*, only a few persons are affected. This is incorrect. As noted the class is estimated to consist of over 150 individuals. Moreover, as the government acknowledged in *Akootchook*, the court's decision will certainly control on all other applications located on other types of withdrawals.

The government further argues that the applications for allotments are unimportant because of benefits granted Natives under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* (Supp. 1983). To the extent the government refers to non-land benefits, such as stock, this argument is illogical. There is no relation between economic benefits of ANCSA and the granting of title to subsistence lands under the Allotment Act. By analogy, could one seriously argue, to a white applicant, that denial of a homestead or mining application is unimportant because Congress enacted a Medicare or food stamp program for which he may be eligible? The answer is clearly no. The various benefits are not mutually exclusive.

Regarding land benefits under ANCSA, the government apparently does not understand how that act works. First, allotment applications may be granted for 160 acres which may consist of four 40-acre tracts. Section 14(c)(1) conveyances under ANCSA, in contrast, have been limited in almost all situations to one five-acre tract. Moreover, in Southeast Alaska, where virtually all class members are located, a separate impediment exists. Because many of the allotment applications are for land across waterbodies from the villages, they are not located on land withdrawn under section 11 of ANCSA, 43 U.S.C. § 1610 (Supp. 1983). In fact, computer abstracts furnished by the Department of the Interior indicate that only 25 percent of the allotments ever filed within the Tongass National Forest are on land selected by village corporations. Section 14(c)(1) conveyances are only available on land conveyed to village corporations. See 43 U.S.C. §

1613(c)(1) (Supp. 1983).

In arguing the correctness of the decision of the court of appeals, the government focuses primarily on the language and structure of the Allotment Act. The government notes that three phrases in the Act refer to occupancy. Two of them unequivocally state a requirement of personal occupancy — that is, the land must be occupied both presently and for a period of five years previously by the applicant. The third occupancy phrase, that concerning national forests, contains no words indicating personal use is required. From this the government concludes that Congress must have intended all three phrases to mean the same. Petitioners respectfully disagree. Congress clearly knew how to require personal occupancy; the fact that it did not use such language with respect to national forest land suggests that it intended something different.

Petitioners argued to the court of appeals that unless the occupancy requirement of section 2 is read to require only *ancestral* occupancy, the additional requirement of five years occupancy found in section 3 would be rendered meaningless.[1] In response the court implicitly agreed that under the government's construction, section 3 would be meaningless in light of section 2 *if* applied to national forests, but found that it has meaning as applied to non-forest land. Appendix to Petition for Writ of Certiorari at 5a. This analysis is unpersuasive because it ignores the fact that sections 2 and 3 were enacted as part of the same subsection in the 1956 amendments for the *specific purpose* of dealing with allotments on national forest land. H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956), CR 27, ex. 11, at 2-3.

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[1] This is because at the time of passage of the 1956 amendments, the Tongass and Chugach Forests were 47 and 30 years old respectively. Thus a requirement of personal occupancy prior to establishment of the forests would itself require a minimum of 30 years personal occupancy by the applicant.

The government apparently recognizes this logical flaw and attempts to deal with it by arguing, in footnote 5 of its brief, that the two requirements protected forest lands in that they served to assure that an applicant's occupancy both antedated the land's inclusion in the forest and continued for a period of five years. Opp. Br. at 7 n.5. This argument is similarly illusory. If the occupancy of a Native in 1956 predated a withdrawal made no later than 1926, by definition it continued for five years. Quite clearly, as construed by the government, section 3 of the Allotment Act played no role in protection of the forests. That is contrary to the express statement of the Congress. H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956), CR 27, ex. 11, at 2-3.

In footnote 6 of their brief, respondents suggest that petitioners would equate "occupancy" as used in section 2 of the Allotment Act with aboriginal title. Petitioners do not now make, nor have they ever made, such a claim. Rather, they have consistently argued that Congress intended to require actual occupancy by individual Natives of a discrete parcel of land. In no sense do they contend that a vague exercise of dominion over the land will suffice.

Finally, respondents take issue with petitioners' reliance on administrative interpretation immediately prior and subsequent to the 1956 amendments. As petitioners noted, Congress intended to enact the substance of existing administrative regulations. The *only* prior interpretation of those regulations, *Jack Gamble*, A-017456 (Aug. 10, 1951), held precisely what petitioners argue — that ancestral, not personal, use is required in a national forest. The government argues, however, that Congress could hardly have been aware of the *Gamble* case. This argument is feckless. The *Gamble* decision was not made by a low-level regional department employee, but rather, on appeal by the Director of the Bureau of Land Management. It is inconceivable that in enacting a bill written and advocated by the Department of the Interior, the Congress could not have been aware of a recent interpretation of a key provision of that bill by one of the highest officials of that Department.

The government dismisses the administrative interpretations, which support petitioners' contentions, immediately subsequent to enactment of the 1956 amendments as irrelevant "because Congress expressly intended to enact the substance of existing administrative regulations." This totally misses the point. The subsequent interpretations are also relevant because they are a contemporaneous construction made by the agency which participated in the enactment of the bill and which was charged with its execution. As such they are due deference by the courts. *Udall v. Tallman,* 380 U.S. 1 (1965).

Respectfully submitted,

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